BAC Home Loans Serv., LP v Elliott
2013 NY Slip Op 32976(U)
November 20, 2013
Sup Ct, Suffolk County
Docket Number: 10-25004
Judge: Jr., John J.J. Jones
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SHORT FORM ORDER

COPY

INDEX NO.: 10-25004

SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

PRESENT: Hon. JOHN J. J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 3-26-13
SUBMIT DATE 11-20-13
Mot. Seq. #001-MotD

BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP,

Plaintiff,

-against-

Paul Elliott, Linda Elliott a/k/a Linda M. Elliot, Wells Fargo Bank, NA, Capital One Bank, Citibank South Dakota, NA, Sidney B. Bowne & Son LLP, United States of America, and "JOHN DOPE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the Complaint,

Defendants.

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Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other_____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendants Paul Elliott and Linda Elliott, striking their joint answer and dismissing their affirmative defenses; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; and (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is determined as indicated below; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on residential real property known as 12 Cove Drive, Sound Beach, New York 11789. On January 17, 2003, the defendants Paul Elliott and Linda Elliott (the defendant mortgagors) executed a fixed-rate note in favor of Florida Bank, NA doing business as Florida Bank Mortgage (Florida Bank) in the principal sum of $192,000.00. To secure said note, the defendant mortgagors gave Florida Bank a mortgage also dated January 17, 2003 on the property. By way of endorsement contained on the note and by way of an assignment of the mortgage dated July 6, 2010, the note and mortgage were transferred to the plaintiff prior to commencement.

The defendant mortgagors allegedly defaulted on the note and mortgage by failing to make their monthly payment of principal and interest due on or about August 1, 2009, and each month thereafter. After the defendant mortgagors allegedly failed to cure their default, the plaintiff commenced the instant action by the filing of a summons and verified complaint on July 13, 2010, followed by the filing of a notice of pendency on July 14, 2010. According to the electronic records maintained by the Suffolk County Clerk's Office computerized database, the plaintiff re-filed the notice of pendency on July 31, 2013.

Issue was joined by service of the defendant mortgagors' joint answer dated August 4, 2010. By their answer, the defendant mortgagors deny some of the allegations in the complaint and admit other allegations therein. In their answer, the defendant mortgagors also assert five affirmative defenses, alleging the following: lack of personal jurisdiction; the failure to state a cause of action; the complaint is fatally defective; payment; and breach of contract. The remaining defendants have filed notices of appearance, and the defendant Sidney B. Bowne & Son, LLP has filed a claim for surplus proceeds.

In compliance with CPLR 3408, a settlement conference was held in this Court's mortgage foreclosure conference part on October 1, 2010. On that date, this case was dismissed from the conference program after the defendant mortgagors failed to appear or otherwise participate. Accordingly, no further conference is required.

The plaintiff now moves for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendants Paul Elliott and Linda Elliott, striking their

joint answer and dismissing their affirmative defenses; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; and (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels. No opposition has been filed in response to this motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the note, bond or obligation, and evidence of default (*see*, ***Valley Natl. Bank v Deutsch***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Das Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank, F.A. v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010], *quoting* ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 644 NYS2d 345 [2d Dept 1997]).

By its submissions, the plaintiff established its prima facie entitlement to summary judgment on the complaint (*see*, CPLR 3212; RPAPL § 1321; ***Wachovia Bank, N.A. v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***U.S. Bank, N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Capital One, N.A. v Knollwood Props. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). In the instant case, the plaintiff produced the endorsed note, the mortgage, the assignment and evidence of nonpayment (*see*, ***Federal Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]; ***First Trust Natl. Assn. v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]). Furthermore, the record before the Court and the moving papers show that the plaintiff complied with the notice requirements of RPAPL §§ 1303 and 1304 (*cf.*, ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the defendant mortgagors' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [unsupported affirmative defenses are lacking in merit]; *see also*, ***Bank of N.Y. Mellon v Scura***, 102 AD3d 714, 961 NYS2d 185 [2d Dept 2013] [process server's sworn affidavit of service is prima facie evidence of proper service pursuant to CPLR 308 (2)]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003] [foreclosing plaintiff has no obligation to modify loan before or after a default]; ***Shufelt v Bulfamante***, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; ***Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn***, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [no competent evidence of an accord and satisfaction]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagors (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagors to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Self-serving and conclusory allegations do not raise issues of fact, and do not require the plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see*, ***Charter One Bank, FSB v Leone***, 45 AD3d 958, *supra*; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

The defendant mortgagors' answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*). In this case, the affirmative defenses asserted by the defendant mortgagors are factually unsupported and without apparent merit (*see*, ***Becher v Feller***, 64 AD3d 672, *supra*). The first affirmative defense, in which the defendant mortgagors allege that the Court lacks jurisdiction over them, is stricken as they do not allege that they were not properly served with process herein (*see*, ***Associates First Capital Corp. v Wiggins***, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). This defense was also waived as the defendant mortgagors failed to move to dismiss the complaint against them on this ground within 60 days after serving the answer (*see*, CPLR 3211[e]; ***Reyes v Albertson***, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; ***Dimond v Verdon***, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). By their second and third affirmative defenses, the defendant mortgagors assert that the complaint fails to state a cause of action, however, they have not cross moved to dismiss the complaint on this ground (*see*, ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, the plaintiff has established its prima facie entitlement to summary judgment. Therefore, the second and third affirmative defenses are surplusage, and the branch of the motion to strike such defense is denied as moot (*see, **Old Williamsburg Candle Corp. v Seneca Ins. Co.***, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]). In any event, the failure by the defendant mortgagors to raise and/or assert each of their pleaded defenses in opposition to the plaintiff's motion warrants the dismissal of the first, fourth and fifth affirmative defenses as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*).

Under these circumstances, the Court finds that the defendant mortgagors failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, *supra*; ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.***, 78 AD3d 920, 912 NYS2d 71 [2d Dept 2010]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, *supra*; *see generally*, ***Hermitage Ins. Co. v Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment in its favor against the defendant mortgagors (*see*, ***Fed. Home Loan Mtge. Corp. v Karastathis***, 237 AD2d 558, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the defendant mortgagors' answer is stricken, and the first, fourth and fifth affirmative defenses set forth therein are dismissed.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by excising the fictitious named defendants, John Doe #1 through John Doe #10, is granted (*see*, ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, *supra*; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.

By its moving papers, the plaintiff further established the default in answering on the part of the remaining non-answering defendants, Wells Fargo Bank, NA, Capital One Bank, Citibank South Dakota, NA, Sidney B. Bowne & Son, LLP, and United States of America (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted remaining defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against the defendant mortgagors, and has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of E. Asia v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Accordingly, this motion for, inter alia, summary judgment and to appoint a referee to compute is determined as indicated above. The proposed long form order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: 20 Nov. 2013

Hon. JOHN J. J. JONES, JR., J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION